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No. 87-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

REPLY ARGUMENT

I. Introduction

Petitioner Koons Ford of Annapolis, Inc. ("Koons Ford"), demonstrated in its petition for writ of certiorari that this Court's review of the decision of the United States Court of Appeals for the Fourth Circuit is warranted because the lower Court's sole rationale for enforcement of the bargaining order is in direct conflict with rulings in other courts of appeals and constitutes an extreme departure from the accepted and usual course of judicial review. Respondent National Labor Relations Board ("NLRB" or "Board") has filed an opposing brief

which attempts to distract this Court's attention from the important issues presented for review. The Board engages initially in a semantical characterization of the Fourth Circuit's ruling, but ultimately collapses with a final plea that, notwithstanding the lower Court having given "excessive weight to the existence of post-hearing charges[,]" the "*Board's* conclusion was amply justified by the reasons *it itself* gave. . . ." *See* Brief For The National Labor Relations Board In Opposition at 13 ("NLRB Brief") (emphasis added). Koons Ford files this reply to address the arguments raised by the Board.

II. The Supreme Court Should Not Accede To The Board's Request To Cure The Fourth Circuit's Failure To Engage In The Required Substantial Evidence Review Of The Agency Decision

The Board urges this Court to deny Koons Ford's petition because the allegedly "correct result" in this case—enforcement of the bargaining order—is supported by substantial evidence. *See* NLRB Brief at 10-13. The Fourth Circuit, however, failed to afford Koons Ford the required substantial evidence review of the Board's bargaining order decision. The lower Court's only observations concerning the adequacy of the NLRB's decision were that the Board had not addressed the turnover in ownership or management and that such "alleged changes . . . involve[d] unresolved questions of fact." (A-5 and n.1). The lower Court refused to rule on Koons Ford's central assertion that the Board had an obligation to consider these issues in the context of determining the appropriateness of a bargaining order (A-4-5), and failed to examine the adequacy of those bases challenged by Koons Ford that the Board did propound for the issuance of such order.[1]

[1] Koons Ford appealed and mounted major substantial evidence attacks on the Board's findings concerning (1) the union majority based on authorization cards, and (2) the conferral of economic benefits for unlawful purposes. *See* Brief for Petitioner Koons Ford of Annapolis, Inc. at 28-50, *Koons Ford of Annapolis, Inc. v.*

The Board now urges this Court to deny Koons Ford's petition on the theory that, although the Court of Appeals "rested its judgment . . . on the alternative ground that petitioner did not have 'clean hands'[,] . . . the results below can stand on the grounds discussed by the Board. . . ." *See* NLRB Brief at 10-11. In furtherance of this argument, the Board devotes virtually all of its opposition brief to a "substantial evidence" review of the agency's decision and its rationale for issuing a bargaining order.[2]

The Board's argument constitutes nothing less than a request that this Court dispose of Koons Ford's petition for writ of certiorari by deciding itself whether the Board's decision is supported by substantial evidence. This Court has refused consistently since at least 1951 to engage in such exercises. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has

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NLRB, No. 87-3801 (4th Cir. October 28, 1987), *reh'g denied*, No. 87-3801 (December 11, 1987). The Fourth Circuit failed even to acknowledge the existence of, much less decide, these two critical issues, notwithstanding the fact that a valid union majority finding is a jurisdictional prerequisite for issuance of a bargaining order. *See Conair Corp. v. NLRB*, 721 F.2d 1355, 1384 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); *Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 116 L.R.R.M. 1105 (1984).

[2] In attempting to cure the Board's failure to address and evaluate in its decision the evidence tendered to the agency by Koons Ford on the turnover in management and ownership issues, the Solicitor General—not referring to the Board's decision, but citing previously ignored evidence contained in affidavits included in the Joint Appendix submitted to the Court of Appeals—now seeks before this Court to engage in an impermissible *post hoc* evaluation of such evidence as a supporting basis for the Board's order. *See* NLRB Brief at 11, lines 15-23. The Fourth Circuit specifically determined that the Board had failed to address these issues; therefore, such issues "involve[d] unresolved questions of fact." (A-5).

placed in the keeping of the Courts of Appeals."); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence. . . .")[3]. Accordingly, the Board's attempt to support enforcement of the bargaining order by urging this Court to engage in *de novo* substantial evidence review should be rejected. *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. at 502 ("Were we called upon to pass on the Board's conclusions in the first instance . . . we might well support the Board's conclusion. . . . But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for [reviewing] Labor Board orders.").

III. The Fourth Circuit's Sole Rationale For Enforcement Of The Bargaining Order Conflicts Directly With Decisions Of Other Courts Of Appeals And Constitutes A Radical Departure From The Accepted And Usual Course Of Judicial Review

The Fourth Circuit clearly relied exclusively upon a negotiated settlement agreement—approved by the NLRB without findings of wrongdoing and expressly providing for *no* admission of guilt by Koons Ford—to make an original finding of "unclean hands" against Koons Ford and, therefore, to enforce the bargaining order. (A-5-6). Such finding of "unclean hands" against a party to a Board-approved settlement with a nonadmissions clause —essentially equivalent to the imputation of guilt—conflicts with decisions of the Sixth and Tenth Circuits. *See NLRB v. Bangor Plastics, Inc.*, 392 F.2d 772, 775

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[3] *See also American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 522-23 (1981) ("Since the [Occupational Safety and Health] Act places responsibility for determining substantial evidence questions in the courts of appeals, . . . our inquiry is not to determine whether we, in the first instance, would find OSHA's findings supported by substantial evidence."); *FTC v. Standard Oil Co.*, 355 U.S. 396, 400-01 (1958) ("We do no more on the issue of [substantial evidence] than decide [whether] the Court of Appeals has made a 'fair assessment' of the record.").

(6th Cir. 1967) ("A settlement agreement does not amount to a finding or admission that respondent has committed an unfair labor practice. . . ."); *W.B. Johnston Grain Co. v. NLRB*, 365 F.2d 582, 587 (10th Cir. 1966) ("It is true that the settlement agreement was not an admission that the Company had been guilty of an unfair labor practice. . . ."). The Fourth Circuit's radical and fundamental departure from existing settlement law, in which the Court simply ignored the well-established proscriptions of Federal Rule of Evidence 408,[4] and engaged in impermissible appellate fact-finding reserved by statute for the Board in a proper remand proceeding,[5] virtually compels an exercise of this Court's supervisory power.

The Board does not challenge Koons Ford's pronouncements of law and policy on the sanctity and importance of settlement agreements. Instead, the Board engages in a semantical characterization of the Fourth Circuit's decision in an attempt to avoid this Court's review. Specifically, the Board urges:

> [T]he court below did not use the settlement to "impute guilt" to petitioner. It merely concluded that the existence of a settlement, and the unfair labor practice charges underlying it, made it appropriate not to require a new evidentiary hearing to enable petitioner to show that post-hearing events had made a fair election possible.

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[4] Assuming *arguendo* that the Court of Appeals could make *de novo* findings of fact, its fact-finding is subject to the Federal Rules of Evidence. Fed. R. Evid. 1101(a).

[5] The National Labor Relations Act ("Act"), commits the fact-finding function to the NLRB. *See* 29 U.S.C. § 160(b) and (c). Where the taking and consideration of additional evidence not in the agency record presented on appeal is deemed appropriate, the Act instructs the reviewing court of appeals to remand the case to the NLRB to allow the agency to make the necessary findings. *See* 29 U.S.C. § 160(e).

NLRB Brief at 12. Contrary to this attempted obfuscation, the Fourth Circuit was clear and direct in enunciating its only rationale for enforcing the bargaining order:

> [W]e have reviewed in this appeal the record in the other [settled] proceeding between the parties. It is obvious that Koons Ford cannot meet the "clean hands" requirement as a condition for objecting to the bargaining order in this case.

(A-6). Upon review of this plain language of the Court's opinion, there can be no rational argument that the Fourth Circuit did not impute guilt or "unclean hands" to Koons Ford on the sole basis of having reviewed the negotiated settlement agreement in the separate Board proceeding between the parties.[6]

The Solicitor General, after inconsistently admitting that the Fourth Circuit determined Koons Ford "did not have 'clean hands'," NLRB Brief at 11, then resorts to a lengthy *post hoc* rationalization seeking to demonstrate that the lower Court's "conclusion was eminently sensible. . . ." NLRB Brief at 12, lines 15-29. The Fourth Circuit, of course, did not explain, or cite any support for, its radical and fundamental departure from well-established settlement law.[7] The Solicitor General similarly fails to justify, or cite any support for, ignoring

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[6] In a moment of candor, and contrary to its advocacy, the Board inconsistently admits elsewhere in its brief the accuracy of Koons Ford's position:

> The court below rested its judgment . . . on the . . . ground that petitioner did not have "clean hands" . . . because in fact unfair labor practice charges . . . had been filed against petitioner and settled by an [agreement] approved by the Board . . . .

NLRB Brief at 11-12.

[7] The Board did not raise the "settlement agreement" issue before the Fourth Circuit Court until oral argument. (A-6). In declining to rule on the fully-briefed issues presented for review, the Court, without notice and without seeking the benefit of supplemental briefing on point by the parties, enforced the bargaining order solely on the basis of its unclean hands finding.

well-established settlement law in an attempt to rationalize the Court's "unclean hands" finding. Indeed, there is none.

The Solicitor General suggests (1) that "the settlement did not insulate the post-hearing events from any possible consideration in connection with determining the appropriateness of a bargaining order[,]" and, in a state-of-mind assertion, (2) that "the court knew that at any reopened hearing the claim of no 'evidence * * * of anti-union animus' would be swiftly dashed." NLRB Brief at 12. These *post hoc* assertions have no merit.

The Board has long held that a settlement agreement is not competent evidence that an employer bears anti-union animus.[8] Moreover, neither the settlement agreement nor the Board's order approving the settlement contains any findings of wrongdoing against Koons Ford, or that any of the events alleged in the unfair labor practice charges actually took place. Finally, the agency "record" of the settled proceeding referred to by the Fourth Circuit (A-6), and the Board, NLRB Brief at 12, by agreement of the parties consists *only* of the settlement agreement, the charges and amended complaint, and a conforming procedural order of an Administrative Law Judge. *See* Settlement Stipulation at Paragraph 6. (A-9). Thus, even assuming *arguendo* that it is permissible to review the record of the settled proceeding in search of some inference of unclean hands or anti-union animus, the defined record of the settled proceeding contains no evidentiary materials or conclusions to support any such inferences.

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[8] *See Southwest Chevrolet Corp.*, 194 N.L.R.B. 975, 79 L.R.R.M. 1156, 1158-59, *enf'd*, 82 L.R.R.M. 2620 (7th Cir. 1972); *Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. 894, n.1, 63 L.R.R.M. 1208 (1967), *enf'd*, 405 F.2d 1 (5th Cir. 1968); *Poray, Inc.*, 143 N.L.R.B. 617, 620, 53 L.R.R.M. 1373, 1374-75 (1963), *petition denied*, 337 F.2d 114 (D.C. Cir. 1964).

IV. The Fourth Circuit Improperly Enforced The Bargaining Order Solely On Grounds Never Considered Or Invoked By The Board

The rationality of the NLRB's bases for decision and the substantiality of evidentiary support were not assessed by the Fourth Circuit. Instead, the lower Court enforced the bargaining order solely on the basis of its review of a settlement agreement and its consequent finding of unclean hands against Koons Ford—"evidence" and grounds never considered or invoked by the Board. Contrary to the assertion of the Board, NLRB Brief at 12-13, the Fourth Circuit's flagrant departure from established law on the proper scope of judicial review constitutes a classic violation of the principles enunciated by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

The *Chenery* doctrine has assumed its proper place as "bedrock" law and this Court has insisted repeatedly and consistently on adherence to its precepts.[9] Koons Ford similarly seeks this Court's review to correct the Fourth Circuit's egregious abuse of the *Chenery* doctrine.[10]

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[9] *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 50 (1983); *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 538-540 (1981); *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *NLRB v. Food Store Employees*, 417 U.S. 1, 9 (1974); *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 764 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

[10] The Board inconsistently acknowledges the error of the Fourth Circuit, admitting "it might be said that the court gave excessive weight to the existence of post-hearing charges in concluding that a reopened hearing would be futile." NLRB Brief at 13. Despite crafting its admission to understate the egregious error of the lower Court, the Board cannot obscure the fact that the Fourth Circuit enforced the bargaining order solely on "evidence" and grounds never considered or invoked by the Board.

The Board finally suggests that, notwithstanding the Fourth Circuit's *Chenery* error, this Court's review and supervision is not warranted because the lower Court's opinion is unpublished. NLRB Brief at 13. This assertion has no merit.

The fact that the challenged Fourth Circuit order is unpublished should carry no weight in the Court's decision to review the case. *See Commissioner of Internal Revenue v. McCoy*, 108 S. Ct. 217, 219 (1987). The Solicitor General's attempt to diminish the compelling need for this Court's review by urging merely that the Fourth Circuit's decision is unpublished rings hollow. In a July 1987 petition for writ of certiorari on behalf of the Commissioner of Internal Revenue in *McCoy*, the Solicitor General successfully sought this Court's review of an unpublished Sixth Circuit Court decision, urging "[W]e do not think that a court should be permitted to ignore [the law], whether or not it chooses to publish its decision." Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit at 14, *Commissioner of Internal Revenue v. McCoy*, 108 S. Ct. 217 (1987).[11]

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[11] Moreover, it cannot be argued that the precedential effect of the Fourth Circuit's decision is negligible merely because it is unpublished. Several circuit courts permit citation to unpublished decisions as precedential authority in varying circumstances. *See, e.g.*, 4th Cir. I.O.P. 36.5 ("If counsel believes . . . that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court."); 6th Cir. R. 24(b) (to same effect as Fourth circuit I.O.P.); 7th Cir. R. 28(d) (no restriction on citation; merely must attach copy of unpublished decision to document). Due to the highly irregular analysis and result reached by the Fourth Circuit, the Board and other litigants in future proceedings could cite the lower Court's opinion with confidence that no published decision of equivalent precedential value exists.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition for writ of certiorari, Koons Ford of Annapolis, Inc. respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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